

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

February 25, 2008 Session

GREGORY YEARY v. CMH MANUFACTURING, INC.

Direct Appeal from the Chancery Court for Claiborne County

No. 14811 Jon Kerry Blackwood, Senior Judge

Filed June 27, 2008

E2007-2190-WC-R3-WC - Mailed May 28, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, Gregory Yeary, suffered a compensable low back injury in October 2003. He received medical treatment and returned to work. In August 2004, he experienced back pain while lifting his two year old son. Mr. Yeary advised his employer that he had never recovered from the original injury and made a workers' compensation claim. The claim was denied. Two evaluating physicians testified that Mr. Yeary had sustained a permanent impairment as a result of the October 2003 injury. Neither doctor could state with certainty the effects of the August 2004 child lifting episode. The trial court awarded 42% permanent partial disability to the body as a whole. The employer, CMH Manufacturing, Inc., has appealed, alleging that the trial court erred in failing to find that the August 2004 event was the intervening cause of the employee's disability, that the amount of the award was excessive, that the trial court erred in requiring payment of unauthorized medical expenses, and that the claim is barred by the statute of limitations. The employer also contends that the trial court placed improper conditions upon granting a stay. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and JERRY SCOTT, SR. J., joined.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the appellant, CMH Manufacturing, Inc.

James M. Davis, Morristown, Tennessee, for the appellee, Gregory Yeary.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Gregory Yeary was thirty-one years old at the time of trial. He had attended school into the tenth grade in a special education curriculum. He testified that he was illiterate, and the evidence supported that assertion. He had worked at CMH Manufacturing, Inc., a manufacturer of mobile homes, for ten years prior to his injury as a wall builder. His job consisted of building the inside wall of the unit, then installing drywall. While at CMH, he had learned to read a tape measure and distances on simple blueprints. His prior work experience had been two months as a part-time cook at a fast-food restaurant and a few months as an upholsterer and “expediter” at a textile mill.

On October 20, 2003, Mr. Yeary experienced a sudden onset of back pain while pulling a sheet of drywall off of a table. He reported the injury immediately to his supervisor and was referred to Dr. Kenneth Matthews. CMH contends it offered Mr. Yeary a panel of physicians but the form on which that is normally done did not appear in Mr. Yeary’s personnel file. Charlie Hemphill, the plant manager, testified the panel of physicians was posted on the company bulletin board. Diana Mallicoat, the safety manager, testified the panel was verbally offered Mr. Yeary. Mr. Yeary testified he was simply referred to Dr. Matthews.

Mr. Yeary saw Dr. Matthews later the same day of his injury. Mr. Yeary had never experienced back problems prior to that time. A March 15, 2000, pre-employment physical revealed no current or previous problems with his back.¹ Dr. Matthews diagnosed a muscle strain, placed Mr. Yeary on light duty, and prescribed pain medication, muscle relaxers and an exercise regimen. He saw Mr. Yeary on two additional occasions, and released Mr. Yeary to full duty with no impairment on October 28, 2003. Mr. Yeary testified that he did not obtain any relief from the treatment provided by Dr. Matthews and complained to his supervisor, Mike Coffey, and to Ms. Mallicoat, that Dr. Matthews was not helping him and that he wanted to see another physician. According to Mr. Yeary, Ms. Mallicoat responded that seeing another doctor made no sense because Dr. Matthews “was about the best that they had.”

Mr. Yeary never missed any work at CMH on account of the injury and continued doing his regular job. According to Mr. Yeary, he was placed on light duty but CMH continued to have him perform his regular job. They did provide a utility employee to assist him for about a week. His back kept getting worse. It was always hurting and one or both of his legs would become numb. Some mornings he was unable to get out of bed and his wife had to put his shoes on so that he could go to work. According to Mr. Yeary, he complained to his supervisor, Mike Coffey, ten to fifteen times about his back pain but was told to “do the best that [he] could do.” Douglas Chapman, the

¹Mr. Yeary initially went to work for CMH in 1994. Because of a company policy that an employee who elected not to receive health insurance could not later change that election, Mr. Yeary quit his job for a short period, then reapplied so that he could obtain health insurance. When he was re-employed he was required to take a pre-employment physical.

production manager, and Roy Simmons, a co-worker, testified at trial and denied that Mr. Yeary made such statements to them during this period. Mr. Coffey did not testify at trial even though he was still in the employ of CMH.

Mr. Yeary continued to work at his regular job until August 2004. On August 1, 2004, Mr. Yeary picked up his little boy from the floor and re-injured his back. He decided to see his personal physician for an evaluation. He went to Max Money who Mr. Yeary described as a family physician but who actually is a nurse practitioner with an office in Claiborne County, Tennessee. Mr. Money sent him for an MRI. As a result of the MRI, Mr. Yeary learned that he had a herniated disk at the L5-S1 level. Mr. Yeary reported the condition to Charlie Hemphill, the general manager of CMH and that it had resulted from the October 2003 injury. According to Mr. Yeary, Mr. Hemphill indicated that since he had seen his personal physician, workers' compensation would not apply and instructed him to report to Ms. Mallicoat and fill out an FMLA (family medical leave) application. Both Diana Mallicoat and Mr. Yeary's wife, Sherry Yeary, filled out portions of the forms requesting family leave and short-term disability benefits. Mrs. Yeary's description of the injury is as follows: "Picked up 2 yr. old son then got down in back. Pain got worse so seen doctor on 8-5." August 1, 2004, is given as the date that his symptoms first appeared.

In addition to the FMLA application, CMH contends that Mr. Yeary told both Mr. Chapman and Ms. Mallicoat that he had injured his back lifting his two-year-old child. Mr. Yeary did not deny making those statements, but elaborated that the August event merely caused an increase in the pain he was already suffering. He also testified that he advised Ms. Mallicoat at or near the time of his August injury that his pain was related to his October 2003 injury. Ms. Mallicoat testified that Mr. Yeary did not make any reference to his previous work-related injury or to workers' compensation until January 2005.

Mr. Yeary testified that after he began receiving short-term disability benefits, he spoke with Mr. Hemphill about getting medical care for the ruptured disc. He was told that since he had applied for family medical leave, the company could do nothing except to extend his disability benefits. He received these benefits for several months. Near the expiration of the benefits, Mr. Yeary was told that he could not return to work at CMH without a full release from his doctor with no work restrictions. Mr. Money refused to sign such a release and Mr. Yeary was terminated. He continued to have pain in his back and legs up to the time of trial, and has not returned to work.

Mr. Yeary admitted that prior to August 2004, he was able to work an entire shift at CMH, and drive to and from work when it was his turn in the car pool. He stopped working after August 2004 because Max Money imposed a ten to fifteen pound lifting restriction. According to Mr. Yeary, when he would drive to work, his legs would become numb and he feared injuring someone. He has fallen several times because of the numbness in his legs and, as the result of one such fall, broke his hand.

Dr. Wayne Page, an occupational medicine physician, performed an independent medical examination in April 2005 at the request of Mr. Yeary's attorney. He testified by deposition. He

reviewed medical records provided to him and conducted a clinical examination of Mr. Yeary. His diagnoses were left sciatica, foraminal narrowing at L4-5 with bilateral radicular pain and a disk bulge at L5-S1. Dr. Page described sciatica as pressure on the sciatic nerve. Dr. Page described the sciatic nerve as being “formed from the lower lumbar nerve roots as they come together and then it forms a nerve that runs down the back of the thigh.”

Dr. Page testified that, based upon the history given to him and the fact he did not have any previous back pain symptoms, the October 2003 incident aggravated Mr. Yeary’s pre-existing degenerative condition, and was the cause of his current symptoms. According to Dr. Page, absent this incident, “he would still be at work, not having any problems.” He opined that Mr. Yeary retained an anatomical impairment of 7% to the body as a whole as a result of the injury. Dr. Page suggested that Mr. Yeary limit lifting to fifty pounds occasionally, twenty-five pounds frequently and ten pounds continuously. He also indicated that Mr. Yeary “should be cautious with lifting, bending and twisting.”

On cross-examination, Dr. Page stated that he was aware that Mr. Yeary had “problems picking up his twenty pound child,” but was otherwise not aware of the August 2004 event. He stated that he did not have enough information about that event to state that the incident was the cause of any of Mr. Yeary’s complaints at the time of the examination. He testified, however, that the problem he diagnosed in Mr. Yeary existed prior to the August 2004 time frame. In Dr. Matthews’ record of October 20, 2003, he described a positive straight-leg raising. According to Dr. Page, “[p]ositive straight-leg raising is a finding that means that there is an impinged nerve or a nerve root irritation.”

Dr. William Kennedy, an orthopaedic surgeon, also conducted an independent medical examination in January 2006 at the request of counsel for Mr. Yeary. Dr. Kennedy’s diagnosis was a right paracentral disk herniation at the L5-S1 level. He opined that the October 2003 incident had caused the injury. He assigned an anatomical impairment of 8% to the body as a whole. He recommended that Mr. Yeary should avoid repetitive bending, stooping, or squatting; should not work on rough terrain; should avoid excessive ladder or stair climbing; and should limit lifting to twenty pounds occasionally and ten pounds frequently. On cross-examination, Dr. Kennedy stated that Mr. Yeary had not mentioned the August 2004 incident to him. He also stated that such an event could “either temporarily or permanently” exacerbate the condition in Mr. Yeary’s back.

Mr. Yeary had not returned to the workforce following his termination by CMH. He testified that he had pain in his back and legs. If he stood in one place more than twenty to thirty minutes, his legs became numb. He stated that he was unable to bend over to tie his shoes. He had difficulty sleeping. He was taking several medications, and no longer drove due to their effects. The trial court found that Mr. Yeary had proven by a preponderance of the evidence that he had sustained a permanent injury as a result of the October 2003 event. It awarded permanent partial disability benefits of 42% to the body as a whole. CMH was ordered to pay for medical treatment received by Mr. Yeary, including the unauthorized treatment.

CMH has appealed, alleging the trial court erred by finding that Mr. Yeary sustained a permanent disability as a result of his October 2003 work injury. CMH further alleges the award of 42% permanent partial disability to the body as a whole is excessive; that the trial court erred in ordering CMH to pay certain unauthorized medical expenses; and that the suit was barred by the applicable statute of limitations. Finally, CMH alleges it was improper for the trial court to require CMH to file a separate acknowledgment of liability, in addition to a bond, as a condition for stay of execution of the judgment during appeal.

STANDARD OF REVIEW

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

1. Causation

CMH contends that the trial court erred in finding that the October 2003 event caused a permanent injury. Its position is based on a combination of two related arguments. The first is that the medical testimony concerning causation is insufficient, because Mr. Yeary did not advise either Dr. Page or Dr. Kennedy of the August 2004 incident. Second, CMH contends that the later incident was an intervening cause. It points out that Mr. Yeary was able to work at his regular job for ten months after the original injury and only became unable to work after the August 2004 event. It also asserts that Mr. Yeary himself treated the injury as not being work-related until it became apparent that he would be terminated if he was unable to return to work. Mr. Yeary argues that he never recovered from the original injury, and that he made this known to co-workers and supervisors. He also argues that the August 2004 incident merely caused a temporary worsening of his symptoms.

The doctrine of intervening cause was described by the Supreme Court in Guill v. Aetna Life & Cas. Co., 660 S.W.2d 42 (Tenn.1983):

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

CMH cites a panel decision involving facts somewhat similar to the present case, Mahle, Inc. v. Reese, No. E2002-1199-WC-R3-CV, 2003 WL 22238957, *3 (Tenn. Workers Comp. Panel Sept. 30, 2003). In that case, the employee had a knee injury. The trial court found that he had completely recovered after having surgery, and that subsequent symptoms were caused by events that occurred after the surgery. The panel held that the evidence did not preponderate against the trial court's finding and affirmed. A similar set of facts was also involved in Hampton v. Henry I. Seigel Co., Inc., No. W2000-01272-WC-R3-CV, 2001 WL 65589, (Tenn. Workers' Comp. Panel Jan. 26, 2001). In Hampton, however, the panel affirmed a trial court's finding that subsequent activity by the injured employee was not an intervening cause.

This is a fact issue, to be reviewed under the preponderance of the evidence standard. With regard to this issue, the testimony of the two doctors is limited. Both doctors testified on direct examination that Mr. Yeary had sustained a permanent impairment as a result of his October 2003 work injury. On cross-examination, Dr. Page was asked if it was possible that Mr. Yeary's current condition was the result of the August 2004 child lifting incident. His answer was "[a]nything is possible," but he added that the condition he had diagnosed existed prior to the August 2004 time period based upon the medical records of Dr. Matthews. Dr. Kennedy agreed during cross-examination that the incident "could have" exacerbated or aggravated Mr. Yeary's condition "either temporarily or permanently." According to Dr. Page, there can be periods of time when Mr. Yeary experiences no radicular pain. However, because he has an "anatomical problem with his back," lifting can cause irritation of the nerve root and radiculopathy can recur. That condition was the reason Dr. Page imposed work restrictions.

CMH presented no medical evidence to support its contention that the August 2004 event was the more likely cause of Mr. Yeary's permanent impairment. The argument advanced by CMH is that Mr. Yeary continued to work for ten months following the October 2003 injury and that he did not treat the injury as work related until he was advised he was being terminated because he could not obtain a full release from his physician. The trial court found that because Mr. Yeary liked his job it was conceivable that he made every effort to continue working for CMH despite the pain he was experiencing. The trial court specifically found CMH informed Mr. Yeary that since he had seen his personal physician, workers' compensation benefits would not apply. Obviously, the trial court accepted Mr. Yeary's explanation as to why he applied for family medical leave rather than workers' compensation benefits. Because the trial court observed the witnesses who testified concerning this issue-both Mr. and Ms. Yeary and the witnesses who testified for CMH- its findings relating to these issues are entitled to great deference by this Panel. After carefully reviewing the record, we agree with the trial court that the expert medical testimony preponderates in favor of a finding that Mr. Yeary's back problems were caused by the October 2003 injury. We are unable to find that the evidence preponderates against the trial court's findings with regard to the issues raised

by CMH. Accordingly, we affirm the trial court's finding that Mr. Yeary proved by a preponderance of the evidence that his injury was work related.

2. Extent of Disability

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. Tenn.Code Ann. § 50-6-241(b) (1999); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990). CMH argues that the award of 48% PPD is excessive, noting that the original treating physician, Dr. Matthews, released Mr. Yeary without restrictions. However, Dr. Matthews did not testify. Dr. Page and Dr. Kennedy both testified that Mr. Yeary had permanent impairment, and suggested limitations on his future activities. Mr. Yeary is illiterate, and has worked only one job for most of his adult life. He testified that his ability to perform routine activities of daily living have been diminished by his injury. The evidence in the record provides ample support for the trial court's conclusion that Mr. Yeary sustained a very substantial disability as a result of this injury.

3. Payment of Unauthorized Medical Expenses

The trial court ordered CMH to pay for unauthorized medical treatment received after August 2004. CMH contends that Mr. Yeary never requested additional medical treatment after seeing Dr. Matthews, and, therefore, it should not be liable for that treatment. However, CMH's position throughout has been that it is not liable for any disability or medical benefits arising after August 2004. The trial court found otherwise, and we have affirmed that finding. The trial court's finding that after the child lifting incident, CMH informed Mr. Yeary that since he had seen his personal physician, workers' compensation benefits would not apply, is controlling here. "An employer who denies liability for a compensable injury is in no position to insist upon the statutory provisions respecting the choosing of physicians." GAF Bldg. Materials v. George, 47 S.W.3d 430, 433 (Tenn. 2001). We, therefore, affirm the judgment as to this issue.

4. Statute of Limitations

In its brief CMH notes that the complaint was filed on January 10, 2005, more than one year after the date of the injury. On that basis, it contends that this claim was barred by the statute of limitations in effect at the time this injury occurred. Tenn. Code Ann. § 50-6-203(1999). CMH raised this defense in its answer. However, there is no motion or similar document, nor reference in the transcript, which suggests that this issue was ever presented to the trial court. An appellate court "may only decide issues which were brought to the attention of the trial judge, 'and acted upon or pretermitted by him.'" In re Sentinel Trust Co. 206 S.W.3d 501, 528 (Tenn.Ct.App.,2005)(citation omitted). We find that this issue has been waived.

5. Bond on Appeal

CMH filed a supercedas bond and motion to stay execution. The parties had agreed on the amount, but Mr. Yeary objected because there was no evidence the proposed surety had the ability to pay the amount of the bond and that the party (CMH) had not signed the bond. The trial court required CMH to sign an acknowledgment that it would be liable for the judgment. CMH argues that this was not necessary, as it was already obligated to pay the judgment by law. Mr. Yeary argues that Rule 62, Tennessee Rules of Civil Procedure, gives the trial court wide discretion concerning the terms of a bond. It also argues that a party should be obligated to “acknowledge responsibility for whatever judgment the appellate court would render” in addition to supplying a surety. No authority is cited for the latter proposition.

Rule 62.04 governs stays pending appeal of judgments. That rule states:

Except as otherwise provided in Rule 62.01, when an appeal is taken the appellant by giving a bond may obtain a stay. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the bond is approved by the court.

Rule 62.05 sets out the specific requirements that a bond must meet in order to obtain a stay:

A bond for stay shall have sufficient surety and: (1) if an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal; in cases involving judgments payable in periodic installments, bond shall be fixed in such a manner as the court shall deem sufficient.

The judgment in this case ordered CMH to pay all benefits to Mr. Yeary in a lump sum. The parties agreed that the amount of the bond was correct. The rule contains only two requirements for a bond to stay a lump sum judgment – that the surety and amount of the bond be sufficient. In this case Mr. Yeary filed an objection to the bond on the ground there was no evidence the proposed surety, American Bankers Insurance Company of Florida, had the ability to pay the amount of the bond. There was no evidence in the record that the proposed surety tendered any evidence of its financial condition to the court. Absent a showing of sufficient surety, we cannot say it was error for the trial court to require CMH Manufacturing, Inc., to execute the bond.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant, CMH Manufacturing, Inc., for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

GREGORY YEARY V. CMH MANUFACTURING, INC.
Claiborne County Chancery Court
No. 14811

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No. E2007- 02190-WC-R3-WC

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, CMH Manufacturing, Inc., for which execution may issue if necessary.